NOTES OF CASES.

Jury—Women Not Qualified by Suffrage Amendment.—In re Grilli, 179 N. Y. S. 795, the Supreme Court of New York held that the right of jury service is not conferred upon women by the constitutional amendment granting them the right to vote.

The court said: "The petitioner insists that the word 'jury' has always meant twelve voters, but there is not a single expression in any of the acts with reference thereto which warrants any such conclusion. For instance, she asserts that because the act of the Colonial Legislature of November 27, 1741 (3 Colonial Laws, c. 720), provided that jurors were to be selected from the freeholders, and freeholders were voters, therefore the duty to sit as a juror followed the right to vote. It is true that law limited the right to freeholders to sit upon a jury, but that is far from meaning that, because a freeholder was a voter, he was a juror because he was such voter. It will be observed that in this very law freeholders over the age of seventy were excluded from jury service.

"It is also argued that the word 'peers' meant those of equal political rights, that is, a right to vote, and that since a jury is to be selected from the peers of the litigants or a person on trial, that meant a jury of voters. ' Peers' might mean voters, yet the claim would be met by having none but voters as jurors. But this would not require the inclusion of women even if they be voters. But the word 'peers' in this country really means a citizen and nothing more. I can see absolutely no connection whatever between the right to vote and jury service to justify relator's claim. Were this the only consideration on this application, there would be no difficulty whatsoever in concluding that women citizens are not entitled to serve as jurors in light of the statute. In respect of this question it has been said in McKinney *v.* State, 3 Wyo. 719, 723, 30 Pac. 293, 295, 16 L. R. A. 710, at page 712: 'We have not much doubt that women were not eligible as jurors under the territorial statutes, as the right to vote and to hold office does not include the right, if right it may be termed, to serve as a juror.'

"Does the enactment in question limiting jury service to male citizens violate any of the constitutional rights of the petitioner? Does this amendment violate the part of the Fourteenth Amendment to the Constitution of the United States which provides:

'* * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.'

"My first impression in this connection was that jury service was not a matter of right, either civil or political, but a matter of duty

which the state has the right to regulate as much as it has the right to regulate the qualifications of its officials. To some extent this view was confirmed by what was said by Mr. Justice Field in a dissenting opinion in Ex parte Virginia, 100 U. S. 539, at page 365 (25 L. Ed. 676):

"'But the privilege or the duty, whichever it may be called, of acting as a juror in the courts of the country, is not an incident of citizenship. Women are citizens; so are the aged above sixty, and children in their minority; yet they are not allowed in Virginia to act as jurors. Though some of these are in all respects qualified for such service, no one will pretend that their exclusion by law from the jury lists impairs their rights as citizens.'

"But the impression was not permitted to ripen into conclusion because of the prevailing opinions of Mr. Justice Strong in that case and in Strauder *v.* West Virginia, 100 U. S. 303, 25 L. Ed. 664. In the latter case, in which Mr. Justice Field dissented on his opinion in the former case, it was held that a statute of West Virginia (Laws 1872-73, c. 47, sec. 1), which provided, 'All white male persons, who are twenty-one years of age, and not over sixty, and who are citizens of this state, shall be liable to serve as jurors, except as herein provided' (the persons excepted were state officials), in effect singled out and denied to colored citizens the right and privilege of participating in the administration of the law as jurors because of their color, though qualified in all other respects, and was a brand upon them, and a discrimination against them forbidden by the amendment; it denied to such citizens the equal protection of the laws, since the constitution of juries is a very essential part of the protection which the trial by jury is intended to secure.

"In Ex parte Virginia, supra, it was held that a county judge of Virginia, charged by the law of that state with the selection of jurors, was properly indicted under an act of Congress, passed for the enforcement of the Fourteenth Amendment, for excluding and failing to select as grand jurors and petit jurors certain citizens of his county of African race and black color, who possessed all other qualifications prescribed by law. In the course of opinion by Mr. Justice Strong, in the Strauder Case, it is stated (100 U. S. at page 310, 25 L. Ed. 664):

"'We do not say that within the limits from which it is not excluded by the amendment a state may not prescribe the qualifications of its jurors, and in so doing make discriminations. It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the Fourteenth Amendment was ever intended to prohibit this. Looking at its history, it is clear it had no such purpose. Its aim was against discrimination, because of race or color.'

"This holding as to race and creed has been incorporated in section 13 of our state Civil Rights Law (Consol. Laws, c. 6). In McKinney *v.* Wyoming, 3 Wyo. 719, 30 Pac. 293, 16 L. R. A. 710 (June, 1892), the question of excluding women from jury service by legislative enactment was considered in the face of a constitutional provision that:

" 'The rights of citizens of the state of Wyoming to vote and hold office shall not be denied or abridged on account of sex. Both male and female citizens of this state shall equally enjoy all civil, political and religious rights and privileges.' Const. Wyo. art. 6, sec. 1.

"The court, while holding that the plaintiff in error could not complain because of the exclusion of females from the jury which tried him on account of any violation of the Constitution of the United States, refused to grant him any relief, because it held a man cannot urge as an infraction of his rights under the state Constitution that no woman was permitted to be on the jury sitting in judgment on him. Only a woman may complain if women are not permitted to serve at her trial.

"The reference in the majority opinion in the Strauder Case to the right of a state to limit jury service to males is purely obiter. It would serve no useful purpose to question the logic of that view in the face of the provisions of the Fourteenth Amendment as it was then considered or under its broadened scope. It is, however, an expression of opinion of the highest court in the land, which, of course, must be highly regarded. Since the adoption of the amendment, jury service has been limited to males by statute or construction thereof in the courts of nearly all the states of the Union and in the federal courts by virtue of an act of Congress which makes the qualifications of a juror in a state his qualifications in the United States courts sitting in that state. Rev. St. U. S. § 600, as amended; Judicial Code, § 275; Fed. Stat. Anno. Supp. 1912, vol. 1, p. 245; U. S. Comp. St. § 1252.

"For over 50 years, the people generally throughout the country, surely in this state, the courts and Legislatures have proceeded upon the idea that women were not entitled as citizens to act as jurors. This long-continued and undisputed practical construction of a constitutional provision is, in effect, a direct judicial construction. More so here, because it is in accord with the expression of our highest court. Minor *v.* Happersett, 88 U. S. (21 Wall.) 162, 22 L. Ed. 627; People, etc., *v.* Dayton, 55 N. Y. 367. While the doctrine stated may be subject to abuse and a ready refuse against the assumption of responsibility, in this case the course of conduct of the federal and state governments in limiting jury service to males has been so unvaried, thousands upon thousands of cases, both civil and criminal, have been tried with only male jurors, with but little objection, for so many years, to adopt any other course than to follow this rule

of construction would be disregarding that which is practically, if not entirely, conclusive."

Malicious Prosecution—Effect of Conviction and Reversal.—In Kennedy *v.* Burbridge, 183 Pac. 325, the Supreme Court of Utah held that a judgment of conviction followed by a reversal, when offered as evidence in a case for malicious prosecution, is at least prima facie evidence of probable cause, but is not evidence of probable cause, where procured by fraud, perjury, or other undue or unfair means employed by the defendant, or where based upon testimony which was untrue, regardless of whether or not such testimony was given unlawfully and corruptly.

The court said: "That the authorities are not in complete harmony will be found upon the most casual examination. The Minnesota court, in Skeffington *v.* Eylward (97 Minn. 244, 105 N. W. 638), divides the cases into three classes: (1) Those which hold that a conviction is conclusive evidence of probable cause, notwithstanding a reversal on appeal; (2) those in which it is held that a judgment of conviction, notwithstanding a reversal, can only be impeached by evidence that it was procured by fraud or perjury, and (3) those which hold that a judgment of conviction when reversed on appeal is only prima facie evidence which may be rebutted by any competent evidence which clearly overcomes the presumption arising from the effect of the conviction in the first instance. The writer, after a somewhat careful review of a large number of cases, is of the opinion that the above classification by the Minnesota court is substantially correct. Conceding this to be true, there is no escape from the conclusion that a judgment of conviction, followed by a reversal, when offered as evidence in a case for malicious prosecution, is at least prima facie evidence of probable cause for the prosecution. It follows, therefore, that where the complaint itself in an action for malicious prosecution shows that plaintiff was convicted in the proceeding complained of, notwithstanding a reversal afterwards on appeal, the complaint fails to state a cause of action unless it goes farther and alleges some fact or facts the legal effect of which is to impeach the validity of the judgment and render it worthless as evidence of probable cause. The fact or facts so alleged should be to the effect that the judgment of conviction relied on as proof of probable cause was procured by fraud, perjury or other undue or unfair means employed by the defendant.

"All of the authorities which we have examined permit evidence of conviction for the purpose of proving probable cause. This is so because when one party is charged with prosecuting another without probable cause the most satisfactory evidence that there was probable cause would be a judgment of conviction, fairly obtained